

### Data Sources Relied Upon

In coming to these opinions, I have reviewed and relied upon the following documents: The Broadcasting Yearbook; The Television Factbook; Arbitron Ratings; NAB Financial Data for TV Markets; NAB Financial Data for TV Stations; CACI, Inc., Database; Revenue and Expense Projections for Channel 65 Prepared by Rainbow Management; and a Summary of Costs Incurred by Rainbow Resulting in the Grant of the Television Channel 65, Orlando, Construction Permit by The FCC and the Subsequent U. S. Supreme Court Affirmation of that FCC Decision.

A. Irreparable Harm - The Construction Permit for the Television Station on Channel 65 Will Be Rendered Worthless Both Today and For the Foreseeable Future

If Gannett allows Press to broadcast from the top slot and its aperture on the Bithlo tower, Rainbow's ability to compete in the Orlando television market will be obstructed to the point that it will not be able to secure the financing to build a television station for Channel 65 on the Bithlo tower or any other tower in the area.

This opinion is based on the following:

1. There are currently four television stations (all of which are currently affiliated with a network) operating from a centrally-located transmitter site in the Orlando area. That market can only accommodate five television stations, i.e., one additional station. Any more stations would not be economically viable since they would not achieve minimum share levels required for buyers of television advertising time.
2. Rainbow was positioned on the Bithlo tower to be the fifth station operating from that central market location.
3. Press's entry on the same slot on the Bithlo tower as currently leased to Rainbow would create two television stations where only one additional station can economically survive on that site.
4. Rainbow will not generate a sufficient viewing audience to achieve minimum share levels required by buyers of television advertising time;
5. Rainbow's revenues (if Press is in their slot) will not offset its operating expenses, capital expenditures, and financing costs;

6. Rainbow will not have a re-sale value on the open market equal to the original cost of building the station and covering its expense short-falls.
7. Rainbow will no longer be economically viable.
8. No financing will be available to build and operate the station, given that it is not economically viable, and the station will never be built.

#### B. Investment Criteria in the Broadcasting Industry

Investors in broadcast properties evaluate opportunities presented to them using standard financial analysis techniques. Simply put, the investor considers whether the project can reasonably be expected to return him his required rate of return. If it can, and assuming other basic criteria are met, he is likely to go forward with the investment.

In the case of Rainbow, the material change that will result from Gannett permitting Press to occupy the top slot and its aperture on the Bithlo tower is that Rainbow will not be able to attract a sufficient viewing audience to achieve minimum share levels required by buyers of advertising time.

#### C. Rainbow/Channel 65's Loss of Fair Market Value

For all practical purposes, if Gannett allows Press to occupy this slot, Rainbow's audience- and revenue-generating capability will be effectively destroyed. Instead of garnering a required minimum (for viability purposes) 4% to 5% audience share, Rainbow will probably attract no more than 2% of the market's audience. As such, it would have no opportunity to sell advertising time to national advertisers.

#### D. Conclusion

Effectively, if Gannett allows Press to mount its antenna in the top slot and its aperture of the Bithlo tower, Rainbow will have endured eight years of litigation only to find that its television station can never be built since it has no fair market value on the open market today or in the foreseeable future.

Further affiant sayeth not.

Harrison, Bond & Pecaro

By Susan D. Harrison  
Susan D. Harrison

Sworn to and subscribed before me this 2nd day of November, 1990,  
in the District of Columbia.

M. Dee English  
Notary Public

My Commission expires: My Commission Expires November 30, 1992

ATTACHMENT B

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA

Case No. 90-2554 DIV-SM

JOSEPH REY, et. al., )  
 )  
Plaintiffs, )  
 )  
vs. )  
 )  
GUY GANNETT PUBLISHING CO., )  
et. al., )  
 )  
Defendants. )  
\_\_\_\_\_ )

172 West Flagler Street  
Miami, Florida  
December 18, 1990  
12:34 p.m. - 4:15 p.m.

Deposition of Joseph Rey

Taken before Stan Seplin, Certified  
Shorthand Reporter and Notary Public in and for  
the State of Florida at Large, pursuant to Notice  
of Taking Deposition filed in the above cause.

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JACK BESONER AND ASSOCIATES, INC.

72 West Flagler Street, Miami, Florida 33130 (305)371-1537

1 but Jules Cohen in his engineering report,  
2 described a top slot as being 1,400 some odd feet,  
3 to 1,500 and some odd feet, whatever.

4 Is it your understanding as you sit  
5 there right now, if you want to put the antenna up  
6 top, that you could put it up at that height on  
7 the tower?

8 A. I could put it up at that height, but I  
9 have to share it, is what they are telling me.

10 Q. We got half this accomplished now.

11 You realize that if you put your  
12 antenna up, it would be put up at the spot they  
13 said you could put it up on?

14 MR. FROMBERG: Objection.

15 You want him to answer the question  
16 differently, but he answered it three times, and  
17 had the same answer.

18 The problem is not that he's denied  
19 being up there, but exclusively.

20 MR. HARDEMAN: That's why I'm asking the  
21 question.

22 MR. FROMBERG: He's answered it.

23 I don't know know he can answer it any  
24 better.

25

ATTACHMENT C

FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C. 20554

DEC 28 1990

IN REPLY REFER TO:

8940-AG

Community Service Telecasters, Inc.  
Agape Coastal Television, Inc.  
c/o David D. Oxenford, Esquire  
Fisher, Wayland, Cooper & Leader  
1255 23rd Street, N.W.  
Washington, D.C. 20037

Dear Mr. Oxenford:

This is in reference to the applications (BAPCT-880921KE, BMPCT-880921KF and BMPCT-890612KE) for consent to assign the construction permit of unbuilt television station WGTJ (Channel 38), Greenville, North Carolina, from Community Service Telecasters, Inc. (Community) to Agape Coastal Television, Inc. (Agape); for minor modification of the construction permit of WGTJ; and for extension of time to construct WGTJ.<sup>1</sup> Since Agape is the permittee of television station WFXI (Channel 8) Morehead City, North Carolina, and the Grade B contours of WGTJ and WFXI overlap in a manner generally prohibited by Section 73.3555 of the Commission's Rules, a satellite operation is proposed and grant of this application is requested pursuant to Note 5 of the rule. The applications have been opposed by WITN-TV, Inc., licensee of television station WITN-TV (Channel 7), Washington, North Carolina, and by Diversified Communications, licensee of television station WCTI-TV (Channel 12), New Bern, North Carolina.

Before the pending assignment and minor change applications can be granted, we must determine if a basis exists for granting the application for extension of time to construct. The extension application will only be granted if the applicant can show: (1) construction is complete and testing is underway; (2) substantial progress in constructing the station has been made; or (3) circumstances beyond the permittee's control prevented construction and the permittee has nevertheless taken all possible steps to resolve the problem and proceed with construction. The Commission does not require construction to be complete, but rather it is concerned that substantial and sustained progress has been made.

<sup>1</sup> The construction permit for WGTJ was granted on November 3, 1986, and the authorization was issued on June 12, 1987. On June 12, 1989, the



Community states that, when the construction permit for WGTJ was granted in 1986, the television station would have been the first independent in the Greenville-New Bern-Washington, North Carolina television market.<sup>2</sup> However, the circumstances changed, asserts Community, when WFXI (Channel 8) in Morehead City, North Carolina, was authorized on April 15, 1987.<sup>3</sup> When the WFXI authorization became final, Community states that it believed that WGTJ became a second-class facility and that the station would be unable to survive as a second independent station in a market below the top 100 markets, in competition with four commercial VHF facilities. Thus, Community decided to sell the construction permit rather than construct the station.

The record before us reflects that Community has taken no steps toward constructing WGTJ. It has acquired no equipment, erected no tower and risked no funds during the time it has held the WGTJ authorization. Community admits that it delayed construction of WGTJ to see if a new VHF station would be allocated to Morehead City. It then determined that with the advent of a new VHF station (WFTT), its station would not be competitive in the market. The Commission's purpose in adopting the requirements set forth in Sections 73.3534 and 73.3535 was to ensure good-faith construction efforts on the part of permittees and thereby "to expedite service to the public." Amendment of Section 73.3598, 102 FCC2d 1054, 1056 (1985). The allocation of a new station to Morehead City, we find, does not provide a basis for establishing circumstances beyond the permittee's control as having prevented construction of the station. Community's decision rests on its own determination of the possible economic effects of that new allocation. Such economic judgments do not constitute causes beyond the permittee's control. New Orleans Channel 20, Inc. 100 FCC2d 1401 (MMB, 1985), application for review denied, 104 FCC2d 304, 313 (1986), aff'd, 830 F.2d 361 (D.C. Cir. 1987). Therefore, we will deny Community's extension request, and the assignment and modification applications will be dismissed as moot.

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<sup>2</sup> Three VHF commercial stations are licensed to the market; namely: WNCT-TV (Channel 9, CBS), Greenville; WCTI-TV (Channel 12, ABC), New Bern; and WITN-TV (Channel 7, NBC), Washington. Also, three noncommercial educational stations are licensed to the market. The market is ranked as the 106th largest television market.

<sup>3</sup> Channel 8 was allocated to Morehead City, effective September 19, 1985. Television Broadcast Station in Morehead City, N.C., 50 Fed. Reg. 33,546 (1985). The construction permit application was filed on February 11, 1986, the permit was authorized on April 15, 1987, and the permit was issued on April 7, 1988.

Even if we were to consider the assignment application, we find that there is no basis for its approval. In this regard, we note that the goals of our multiple ownership rules are to promote economic competition and diversity of programming viewpoint. See e.g., Multiple Ownership of Standard, FM and Television Stations, 45 F.C.C. 1476, 1476-77, reconsideration denied, 45 F.C.C. 1728 (1964). The contour overlap or "duopoly" rule serves those goals by insuring that commonly owned stations do not serve significant areas in common. As noted at the outset, our Rules permit exceptions to the duopoly rule for stations that are classified as "satellites" or "primarily satellites," under Note 5 of Section 73.3555 of the Rules. What constitutes a sufficient showing for an exception to the duopoly rule for a satellite operation has been established by case law and involves a balance of various factors, including the degree of overlap between the stations, the capacity of the market to support a full-service station, the level of service available in the market, the financial difficulties of the stations involved, as well as other considerations. See Further Notice of Proposed Rulemaking in MM Docket No. 87-8, FCC 90-279 (adopted August 2, 1990) paras. 2, 10.

It does not appear that Greenville is an "unserved or underserved" market. There are six television stations licensed to cities in the market (three commercial and three noncommercial). This does not include WFXI, which is being constructed. One of the three commercial stations, WNCT-TV, is licensed to Greenville. In addition to those stations, the market receives service from twelve other television stations licensed to cities in other markets. Although the extent of the overlap presented here is in the range of other satellites permitted previously, we find that the request is not outweighed by the service needs of the area and would result in an inefficient use of spectrum. In addition, we find no support for approving the satellite proposal simply for the purpose of extending the reach of WFXI to the center of the market, particularly since that area is well served. Further, the concern that viewers in the service area between WFXI (Channel 8) and WITN-TV (Channel 7), as well as WNCT-TV (Channel 9), might experience co-channel interference, which could be alleviated by turning to WGTJ operating as a satellite, does not support a satellite operation of WGTJ. This concern regarding co-channel interference was raised and rejected in Amendment of Section 73.606(b) (Morehead City, North Carolina) 2 FCC Rod 4146 (1987), aff'd sub nom. WITN-TV, Inc. v. F.C.C., 849 F.2d 1521 (D.C. Cir. 1988).

Lastly, on April 27, 1990, the applicants filed a supplement to the satellite proposal stating that, if the satellite request was not approved, they would modify the WGTJ construction permit so that the Grade B contour of WGTJ would not overlap the Grade B contour of WFXI. An engineering study was submitted with the new proposal. While the new proposal was not preferred, the applicants stated that it would allow WFXI's programming to be received elsewhere in the market. In view of our decision with respect to the extension of time to construct

WGTJ, we need not examine this proposal. We do note, however, that the proposal would result in a substantial loss of proposed service when compared to the authorized facilities.

Accordingly, the petitions to deny filed by WITN-TV, Inc. and Diversified Communications ARE GRANTED; the application for extension of time to construct WGTJ IS DENIED; and the applications for minor modification of WGTJ's construction permit and for assignment of the WGTJ construction permit ARE DISMISSED as moot. Further, the call sign for channel 38 (WGTJ) IS DELETED and the authorization for the television station IS RESCINDED.

Sincerely,



Barbara A. Kreisman  
Chief, Video Services Division  
Mass Media Bureau

cc: Alan C. Campbell, Esq.  
Craig J. Blakely, Esq.

**ATTACHMENT D**

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA

Case No. 90-2554 DIV-SM

JOSEPH REY, et. al., )  
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 Plaintiffs, )  
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 vs. )  
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 GUY GANNETT PUBLISHING CO., )  
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JACK BESONER AND ASSOCIATES, INC.

172 West Flagler Street, Miami, Florida 33130 (305)371-1537

1 Q. What is her name?

2 A. Margot Polovi.

3 Q. Why did Rainbow oppose the swap of  
4 Channel 68 with 18?

5 A. On what basis was it opposed?

6 I mean, what are you asking?

7 Q. What was your reason, personal or  
8 otherwise, for getting involved in that swap?

9 A. Number one reason is that they were  
10 proposing the same lease space that I have with  
11 Gannett.

12 Other reasons are that they would  
13 become a competitor in my own marketplace.

14 Other reasons are, of legal nature on  
15 how the swap was proposed, that I-- I'm not a  
16 lawyer, so I can't really tell you those things.

17 Q. Well, I understand that the lawyer can  
18 figure out the legal way of taking an application,  
19 but as far as your personal reasons or your  
20 business reasons are concerned-- the first two you  
21 mentioned, were that--

22 A. The business reasons are that they were  
23 proposing to put their antenna right smack in my  
24 space, at the Bithlo tower, and also by doing  
25 that, they would become a direct competitor.

1 Q. With you?

2 A. Correct.

3 Q. Now, how did you come to understand  
4 that the swap took place, that the new antenna  
5 would be going in your antenna space?

6 A. From their application.

7 It's public record at the FCC.

8 Q. What is in the the application, that  
9 put you on notice of this problem?

10 A. I--

11 Q. They designated in the application,  
12 they are going to come to the Bithlo tower?

13 A. Yes.

14 Q. And they put in the application, what  
15 height they want to broadcast from?

16 A. Yes.

17 Q. And by reviewing that application,  
18 that's how you became aware of--

19 A. Well, I knew it from his phone call.

20 He--

21 MR. FROMBERG: His, being--

22 THE WITNESS: Rick Edwards.

23 Thereafter, the papers that come out of  
24 the FCC, corroborated everything he said of  
25 Channel 18 mounting next to Channel 65, on the

**CERTIFICATE OF SERVICE**

I, Harry F. Cole, hereby certify that on this 15th day of February, 1991, I have caused copies of the foregoing "Informal Objection" to be placed in the United States mail, first class postage prepaid, addressed to the following individuals:

The Honorable Alfred C. Sikes (By Hand)  
Chairman  
Federal Communications Commission  
1919 M Street, N.W. - Room 814  
Washington, D.C. 20554

The Honorable James H. Quello (By Hand)  
Commissioner  
Federal Communications Commission  
1919 M Street, N.W. - Room 802  
Washington, D.C. 20554

The Honorable Sherrie P. Marshall (By Hand)  
Commissioner  
Federal Communications Commission  
1919 M Street, N.W. - Room 826  
Washington, D.C. 20554

The Honorable Andrew C. Barrett (By Hand)  
Commissioner  
Federal Communications Commission  
1919 M Street, N.W. - Room 844  
Washington, D.C. 20554

The Honorable Ervin S. Duggan (By Hand)  
Commissioner  
Federal Communications Commission  
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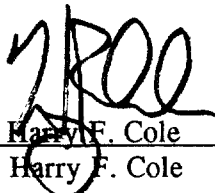
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Barbara A. Kreisman, Chief (By Hand)  
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Counsel for Rainbow Broadcasting Company

/s/

  
Harry F. Cole  
Harry F. Cole